(26)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 449

HERMAN J. RUBENSTEIN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FRANCIS J. QUILLINAN,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Herman J. Rubenstein, respectfully submits his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled case on August 25, 1945 (R. 225), affirming the judgment of conviction of the District Court of the United States for the Southern District of New York (R. 189).

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals for the Second Circuit (Circuit Judges L. Hand, Augustus N. Hand and Frank; Judge L. Hand writing) was filed August 25, 1945, and appears at page 210 of the record. It is reported in F. (2d) ——. There is a dissenting opinion by Judge Frank (R. 215).

Jurisdiction

1. The jurisdiction of this Court is invoked under Judicial Code, Section 240 as amended by the Act of February 13, 1925; 43 Stat. 938; U. S. C. Title 28, Section 347.

2. The original date of the judgment to be reversed is August 25, 1945 (R. 225).

Questions Presented

1. Whether the Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended) requires an appellant to establish prejudice in addition to substantial error.

2. Whether the rule applied in the Circuit Court of Appeals for the Second Circuit, that a conviction will be affirmed on appeal if from the record before it the Appellate Court believes a defendant proven guilty regardless of any erroneous and prejudicial evidence therein, impairs the right to a jury trial under the Constitution, Article 3, Section 2, Clause 3 and Amendment VI.

3. Whether the above mentioned rule of the Second Circuit is contrary to the rule of this Court.

4. Whether the above mentioned rule of the Second Circuit is in conflict with the rule followed in the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits.

Statutes Involved[1]

Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended) in part provides:

"* * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Constitution of the United States, Article 3, Section 2, Clause 3:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *."

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[1] The statutes on which the indictment is founded are the following:

R. S. #5440; May 17, 1879, C. 8, 21 Stat. 4; March 4, 1909, C. 321, #37, 35 Stat. 1096 (Title 18 U. S. C. Sec. 88) provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more or such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Act of March 4, 1929, C. 690, #2, 45 Stat. 1551 (Title 8 U. S. C. Sec. 180a) provides in part:

"Any alien who after March 4, 1929, * * * obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or by both such fine and imprisonment."

Paragraph (c) of Act of May 26, 1924, c. 190, #22, 43 Stat. 165; Reorg. Plan No. V, eff. June 14, 1940, 5 Fed. Reg. 2423, 54 Stat. 1238 (Title 8 U. S. C. Sec. 220) provides:

"Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

Statement of the Case

The petitioner was tried alone for conspiring to obtain the entry into the United States of one Alice Spitz, a Czechoslovakian, by means of a false and misleading petition and application filed with the Immigration and Naturalization Service (R. 4-8). Sandler, Muller and said Alice Spitz were named as co-defendants. They pleaded guilty prior to the trial but were not sentenced until after it (R. 41, 99, 111). They were the principal witnesses for the prosecution.

The chief alleged fraud, upon which the case turned, was the failure to disclose that Spitz' marriage to Sandler consisted of a bare legal ceremony which was entered for the purpose of procuring Spitz' entry and with the mutual understanding that, after she had entered the United States as the wife of an American citizen, the marriage would be dissolved.

Muller was a family connection of Spitz. It was to him she applied to find her an American husband when, while here on a temporary visa, Hitler invaded Czechoslovakia, so that she became afraid to return (R. 42, 63, 105). Thereafter Muller introduced Sandler to Spitz who offered him $200 upon his agreeing to her proposal (R. 24, 25, 68, 69, 106). They were married on July 29, 1939, by a Judge in Newark, N. J. (R. 25, 69).

It was not until the following spring that petitioner allegedly entered the conspiracy. Spitz was introduced to him by chance and, learning that he was a lawyer, asked

him to prepare the necessary papers for her entry (R. 27, 28). There was evidence that petitioner was informed of the intention to procure a divorce after the entry would have been effected (R. 36, 71).

As the result of the documents which were prepared and submitted to the authorities by petitioner, Spitz was granted a permanent visa at Montreal under which she re-entered the United States on December 20, 1940 (R. 21, 38).

As part of its prima facie case the Government also offered evidence to show that in Janaury, 1941, Spitz came to petitioner's office and asked him to get her a divorce (R. 39, 149). An action was commenced in the New York Supreme Court on January 25th, as a result of which a divorce was granted (R. 41, 151, 154). Evidence was admitted showing that petitioner procured one Haimowitz to execute a false affidavit of service upon Sandler of the summons and complaint in the divorce action (R. 116, 117), a false affidavit of non-military service regarding Sandler, who was then in the army (R. 77, 120, 121), and to swear falsely before the official referee that he had discovered Sandler in a room with a partially dressed woman (R. 118, 119).

At the trial petitioner's counsel repeatedly objected to the introduction of testimony concerning the divorce upon the ground that the conspiracy attained its object and terminated with Spitz' entry on December 20, 1940 (R. 38-41, 74-75, 78-79, 112-121). Also at the close of the prosecution's case and at the close of the entire case petitioner moved to strike out all such testimony (R. 129, 177). These motions were denied without any other statement by the trial court of the grounds for admitting the evidence.

Petitioner also requested the trial court to take judicial notice under the testimony and under the law and statutes of New Jersey and New York that the marriage of Spitz

and Sandler was neither void nor voidable, which request was denied. Petitioner also moved to strike out the testimony concerning the divorce in this connection, i. e. that it was not the marriage but the collusive divorce which was void or voidable, which motion likewise was denied (R. 79, 80).

On appeal to the Circuit Court of Appeals the above mentioned rulings of the District Court were assigned as error (R. 203, 204).

Specification of Errors

The Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the judgment of the trial court.

2. In holding the fact of a divorce, occurring after the termination of the conspiracy, was admissible in evidence (R. 212).

3. In holding that the concealment from the immigration authorities of a subjective intent to obtain a divorce constitutes fraud in a criminal case (R. 214-215).

4. In holding that ti was no error (R. 213) or harmless error (R. 214) to admit evidence of petitioner's subornation of perjury in connection with two affidavits and testimony in the divorce proceeding, and of his attempt to procure a collusive divorce by asking Sandler to get a girl to go to a hotel room (R. 213).

5. In holding that Spitz and Sandler were not married (R. 214).

Reasons for Granting the Petition

A review of the decision of the court below is sought:

1. Because the question of whether or not the Act of February 26, 1919, Ch. 48, 40 Stat. 1181, 28 U. S. C. A. #391 (Judicial Code #269 as amended), requires an ap-

pellant to establish prejudice in addition to substantial error, is an important question in the administration of federal criminal justice.

2. Because the effect of the decision of the court below is that, if from the record the appellate court believes a defendant proven guilty, it will disregard any erroneous and prejudicial evidence and the effect this might have had upon the jury, thereby impairing the defendant's right to a jury trial under the Constitution, Article 3, Section 2, Clause 3 and Amendment VI.

3. Because the harmless error rule followed by the Second Circuit and applied in this case is contrary to the rule of this court. *Weiler* v. *United States,* 323 U. S. 608, 611; 65 S. Ct. 548; 89 L. Ed. 443 (1945); *Bruno* v. *United States,* 308 U. S. 287, 294; 60 S. Ct. 198; 84 L. Ed. 257 (1939); *McCandless* v. *United States,* 298 U. S. 342, 347, 348; 56 S. Ct. 764; 80 L. Ed. 1205 (1936).

4. Because the harmless error rule followed by the Second Circuit and applied in this case is in conflict with the rule of the six other Circuits which have passed upon the question. *Farris et al.* v. *Interstate Circuit, Inc.,* 116 F. (2nd) 409, 412 (C. C. A. 5th—1941); *Evansville Container Corporation* v. *McDonald,* 132 F. (2nd) 80, 85 (C. C. A. 6th—1942); *Worcester et al.* v. *Pure Torpedo Co.,* 127 F. (2nd) 945, 947, 948 (C. C. A. 7th—1942); *Fort Dodge Hotel Co.* v. *Bartelt,* 119 F. (2nd) 253, 259 (C. C. A. 8th—1941); *Lynch* v. *Oregon Lumber Co. et al.,* 108 F. (2nd) 283, 285, 286 (C. C. A. 9th—1939); *Little* v. *United States,* 73 F. (2nd) 861, 866, 867; 96 A. L. R. 889 (C. C. A. 10th—1934).

Judge Learned Hand's opinion states there was no error (R. 214) in admitting detailed evidence of suborned perjury as merely cumulative evidence to prove a collusive divorce to prove a previously existing intent to divorce, which, it is held, was a part of the crime. If the statement expressed

the actual substance of the decision, petitioner would not vainly ask this court to review a holding in the law of evidence. Actually it is tacitly but clearly signified in the subsequent wording of the opinion that the admission of this evidence is deemed error but as such is held harmless error within the rule applied in the Second Circuit. Immediately following the statement of no error, the Opinion supplies various finely spun reasons which culminate in the propriety of the prosecution buttressing its facts as much as possible (R. 213). Nevertheless, the opinion then continues in these words (R. 213): "Besides, even if the affidavits and the testimony had not been competent, Rubenstein was not injured." It is significant that the opinion likewise states, "The crime was proved beyond the faintest peradventure of doubt" (R. 215). It is clear that the Court below was thus applying its interpretation of the harmless error rule, namely that if the appellate court decides from the record that the defendant was guilty, it will disregard the effect any error may have had on the jury.[2]

The detailed evidence of the distinct and serious crime of suborning perjury was, at the most, but weakly probative of the facts in issue while at the same time it was very likely to prejudice the jury against the defendant. As such it was plainly inadmissible. *United States* v. *Krulewitch*, 145 F. (2nd) 76, 80 (C. C. A. 2nd—1944); Wigmore on Evidence, Section 1904.

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[2] The Circuit Court of Appeals for the Second Circuit in *United States* v. *Liss*, 137 F. (2nd) 995, 999 (1943) explicitly stated its rule as follows:

"No question arises more often in criminal appeals than whether an error should result in reversal; formerly—acknowledging that it is theoretically impossibe to fathom the jurors' mind—it was the practice to give the accused the benefit of every intendment; and indeed the modern disposition to assume that an error has been harmless cannot rest upon any unsparing logical analysis. Perhaps all that a court should ever say is that a remote chance of prejudice shoud not balance the extreme probability that the jury came to the right result. A majority of us think that this was the case here."

This petition for certiorari stands on the proposition that the interpretation of the harmless error rule entertained in the Second Circuit is not correct. It is respectfully submitted that the guidance of the Supreme Court on this subject ought not to be evaded because of dextrous words in an opinion that end to veil its actual, undistorted purport.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated: September 24, 1945.

HERMAN J. RUBENSTEIN,
By FRANCIS J. QUILLINAN,
Counsel for Petitioner.

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671564—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 449

HERMAN J. RUBENSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 210–224) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered August 25, 1945 (R. 225). The petition for a writ of certiorari was filed September 24, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, in the trial of an attorney for conspiracy to perpetrate a fraud against the United States by aiding an alien in obtaining a visa on the basis of a marriage which the parties intended would shortly be terminated by a divorce, it was error to permit the Government to introduce evidence that petitioner suborned perjury in a divorce proceeding instituted by the alien a month after her entry into this country on a permanent basis.

STATEMENT

Petitioner was tried alone in the District Court for the Southern District of New York on an indictment charging that, in violation of Section 37 of the Criminal Code (18 U. S. C. 88), he and others conspired to violate the immigration laws and to defraud the United States by securing the entry of an alien into the United States by means of concealment of material facts and by false documents (R. 4–8). He was convicted and sentenced to imprisonment for six months (R. 188, 189).[1] On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was affirmed, one judge dissenting (R. 210–225).

The evidence for the Government may be summarized as follows:

Alice Spitz, an alien, was in this country on a temporary visa and wished to remain perma-

[1] Three of the codefendants had pleaded guilty prior to trial (R. 2).

nently (R. 16, 22–23). She agreed to pay one Sandler $200 if he would marry her but not live with her, stating that they would be divorced within six months (R. 24–25, 45, 69, 85). The marriage ceremony was performed in July 1939, and the parties thereafter separated and never lived together as husband and wife (R. 25–26, 41, 69, 83).

In the spring of 1940 Miss Spitz consulted petitioner, an attorney, and told him that she had married an American citizen in order to get a visa (R. 28). Petitioner sent for Sandler and questioned him about his birth place, earnings, etc. (R. 70–71). When Sandler told petitioner that signing papers was no part of his agreement, petitioner replied that it was merely a formality and that the divorce would take place thereafter (R. 71). On a subsequent visit to petitioner's office Sandler signed a document in blank (R. 73, 93). This was a petition for the granting of a visa to Miss Spitz as Sandler's wife (Gov. Ex. 2, R. 16, 190–191), and, in its completed form, it contained a number of false statements as to Sandler's employment and earnings (R. 66–67, 73). One Muller, a relative of Miss Spitz, also signed an affidavit in petitioner's office in which he falsely swore that he had known Sandler for fifteen years (R. 108–109). On the basis of these and other documents, Miss Spitz obtained in Canada a non-quota visa for entry into the United States (R. 16–18, 21, 38).

About a month after she entered this country on a permanent basis, Miss Spitz asked petitioner to secure a divorce for her (R. 39). Petitioner talked with Sandler and suggested that he go to a hotel room with a girl. When Sandler declined to do so, petitioner stated that they would "assume" that Sandler was "caught" with a girl at an address on Reid Avenue near Sandler's residence (R. 75). Sandler testified that he was never served in the divorce action and never found with a woman at the Reid Avenue address (R. 75). One Haimowitz testified that petitioner agreed to pay him $10 if he would serve as a witness in the divorce action (R. 115); that petitioner mailed to him an affidavit of service of the summons and complaint on Sandler which Haimowitz signed before a notary, although he had not in fact made such service (R. 116–117); and that, pursuant to petitioner's instructions, he falsely testified at the hearing in the divorce action that he had observed Sandler with another woman at 103 Reid Avenue in Brooklyn (R. 118–119, 122–127).

At all times when the divorce proceeding was mentioned at the trial below, petitioner's counsel objected to the introduction of evidence thereof on the ground that the divorce action was instituted after the object of the conspiracy charged in the indictment, i. e., the entry of Miss Spitz into the United States, had been accomplished (R. 38–39, 75, 112, 115). He also moved at the

close of the Government's case to strike out all testimony in respect of the divorce (R. 129); he did not more specifically move to strike out the testimony of Haimowitz as distinguished from the other evidence concerning the divorce.

Petitioner took the stand in his own behalf and testified that he understood that Sandler and Miss Spitz were validly married, and that they told him that they planned to go to Cuba together for the purpose of obtaining a visa for Miss Spitz (R. 133–134, 139, 145); that subsequently she told him Sandler's vacation time had passed and that petitioner therefore arranged to have her go to Canada instead of Cuba (R. 145–146); that the document signed by Sandler which was submitted in obtaining the visa was validly executed and contained information supplied by Sandler (R. 134–138); that subsequent to her entry into this country on a permanent basis, Miss Spitz told him that her husband was "going around with women" and asked him to obtain a divorce (R. 149); that he tried to persuade her not to seek a divorce but that she was determined to go ahead (R. 149–150); that he asked Haimowitz to investigate the case and that Haimowitz informed him that Sandler was living at Reid Avenue with another woman (R. 151).

In submitting the case to the jury, the district judge explained the contention of the Government that the marriage was a scheme to defraud the United States (R. 181–182) and called the jury's

attention to the fact that petitioner claimed that the parties had never disclosed to him that the marriage was not an honest one (R. 182). He mentioned that the divorce proceeding was instituted a few weeks after Miss Spitz entered the country on a permanent basis (R. 182–183) and then charged the jury as follows:

> * * * The Government asks you to believe from this that it is a corroborative circumstance of probative value, and whatever may have been the fact, it says that the defendant must have known what was in contemplation from the outset. And then you heard the witness who came in, who had known the defendant for a number of years, who testified that he never as a matter of fact served the defendant Mr. Sandler in the divorce action and that the defendant Rubenstein told him what to say about getting evidence or what he should testify to as to the alleged misconduct of the defendant in the divorce case. You may give that circumstance such weight as you care to give it. So far as this charge is concerned we are not particularly interested in the divorce case. That was a fraud against the State of New York, if it was a fraud. And so, that is the thing you should consider that here were a man and woman who had not lived together long, who had been in the office of the defendant one or more times, and who apparently were cordial and friendly, and yet within three weeks or thereabouts after she comes back

> Mrs. Sandler goes to the defendant and asks for the divorce and says her husband is untrue to her and unfaithful and is philandering with other women and she wants a divorce. It is for you to say whether or not that does indicate that the defendant had reason to believe from the outset that he was engaged in an unlawful enterprise. * * *

On the appeal, petitioner assigned, as one ground of error, the admission of evidence concerning the divorce action (R. 202, 203). All three judges of the court below agreed that it was proper to show that there was a divorce and that petitioner aided in its procurement (R. 212, 215), but there was a division of opinion as to whether it was proper to permit testimony indicating that petitioner had suborned perjury in procuring the divorce (R. 213, 216). The majority of the court below were of the opinion that the admission of such testimony was not error and that, even if it were, the error was harmless (R. 213–214).

ARGUMENT

Petitioner asks this Court to resolve the controversy in the Second Circuit as to the scope of the harmless-error doctrine. Before that question can be reached, however, it must be determined that there was error. Both the dissenting judge below (R. 217, insert) and petitioner (Pet. 7–8) assume that the secondary portion of the majority opinion represents an abandonment of

its earlier position that "we do not think that it was erroneous to admit the evidence" of subornation of perjury in the divorce suit (R. 213). Manifestly, however, that portion of the majority opinion which expresses the view that the error was harmless was merely an alternative argument, of significance only if the initial determination that there was no error is incorrect.

We think that the majority of the court below were clearly correct in holding that the admission of the testimony as to subornation of perjury in the divorce proceeding was not erroneous. The gist of the offense for which petitioner was tried was that he, Miss Spitz, Sandler and others, conspired to defraud the United States by utilizing a marriage not entered into in good faith by Miss Spitz and Sandler as the basis for securing the admission of Miss Spitz into the United States for permanent residence as a nonquota immigrant. 8 U. S. C. 204 includes as a nonquota immigrant "an immigrant who is * * * the wife * * * of a citizen of the United States." And the husband must establish, in a verified petition for the admission of his wife as a nonquota immigrant, that he "is able to and will support the immigrant if necessary to prevent such immigrant from becoming a public charge" and he is required to support his petition by the statements under oath of two responsible citizens who have known him for at least a year. 8 U. S. C. 209.

It is evident that the immigration laws contemplate that a wife is not to be admitted as a nonquota immigrant unless she comes here for the purpose of establishing her home with her American husband in the close relationship which ordinarily attaches to the status of husband and wife.[2] Hence, there can be no doubt that the utilization by the defendants of a marriage which was entered into with no idea of establishing the normal relationship of husband and wife and which it was agreed would be speedily terminated by divorce is not the type of marriage which brings the alien spouse within the provisions of the immigration laws relating to nonquota immigrants.

The crucial issue in this case is whether petitioner was aware of the character of the marriage when he arranged on the basis of it to have Miss Spitz admitted as a nonquota immigrant. It is undisputed that petitioner had no part in the original arrangements for the marriage. But that he knew the character of the marriage at the time he applied for the visa for Miss Spitz is evident from the testimony of Sandler that petitioner told Sandler, when Sand-

[2] The majority below were of the view that the marriage was an invalid one (R. 214–215), but we think that whether it was or was not is unimportant since a valid marriage entered into pursuant to an arrangement like that between Miss Spitz and Sandler would thwart the purpose of the immigration laws equally with an invalid marriage.

ler objected to signing papers, that it would be a formality and "that the divorce would take place right after that" (R. 71). Certainly, however, the Government was not required to stop at this point in the production of evidence bearing on the question of petitioner's knowledge. It was entitled to round out the picture with any other available evidence which would tend to show that petitioner knew that the parties did not intend to live together as husband and wife when he sought the visa. The commencement by petitioner within a month after Miss Spitz's entry for permanent residence of a divorce proceeding occasioned by no legitimate ground which had arisen since the marriage but which had to be supported by a charge of adultery which he could only maintain by procuring perjured testimony, is strongly corroborative, we believe, of Sandler's testimony indicating that petitioner, when he took steps to secure Miss Spitz's entry, knew that the marriage was not an honest one but one which the parties planned to terminate by divorce as speedily as some ground could be manufactured.[3]

[3] That petitioner intended to deny knowledge that the marriage was not an honest one had been indicated by defense counsel's cross-examination of Miss Spitz and Sandler, both of whom were asked whether they had not told petitioner that they were going to Cuba together to apply for the visa (R. 64, 94–95). And, when petitioner took the stand in his own defense, he did disclaim any knowledge of the fraudulent character of the marriage (see p. 5, *supra*).

The difference between the probative force of Sandler's testimony without corroboration and the same testimony supported by the additional proof that petitioner so actively assisted in the divorce that he suborned perjury in order to procure it, seems to us self-evident. The testimony as to the subornation of perjury in the divorce proceeding was not, as petitioner claims (Pet. 8), weakly probative. More than the evidence showing the fact of the divorce, it was evidence strongly tending to establish the most important issue in the case, i. e., petitioner's guilty knowledge of the preconceived plan to terminate the sham marriage by a divorce.[4] If the testimony as to the subornation of perjury was relevant on the question of knowledge, as we submit, it cannot matter that it disclosed that petitioner had added another crime to that which he had already committed. *Moore* v. *United States,* 150 U. S. 57; *Devoe* v. *United States,* 103 F. 2d 584 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. 2d 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Dysart* v. *United States,* 270 Fed. 77 (C. C. A. 5), certiorari denied, 256 U. S. 694.

[4] In his instructions (see pp. 6–7, *supra*), the judge was careful to point out to the jury that they were not to be concerned with the fraud on the New York court, but were to consider the evidence in respect of the divorce only on the question of petitioner's guilty knowledge.

CONCLUSION

There was no error in the admission of the evidence in question and hence the case does not present the question sought to be raised as to the scope of the principle of harmless error. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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